

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE STATIC RANDOM ACCESS MEMORY
(SRAM) ANTITRUST LITIGATION

No. 07-md-01819 CW

ORDER DENYING PART
OF DEFENDANT
SAMSUNG'S MOTION
FOR SUMMARY
JUDGMENT: DIRECT
PURCHASER
WESTELL'S
INDIVIDUAL CLAIMS
(Docket No. 1039)

_____/

Defendants Samsung Electronics Company, Ltd. (SEC) and
Samsung Semiconductor, Inc. (SSI), collectively referred to as
Samsung in this order, move for summary judgment or, in the
alternative, partial summary judgment on the individual claims of
Westell Technologies, Inc., the sole class representative for the
Direct Purchaser (DP) Plaintiffs.¹ Docket No. 1039. Also
included in this motion is Samsung's request for summary
adjudication in its favor on DP Plaintiffs' claims to the extent

¹ Samsung Electronics America, Inc. (SEA) originally joined SEC
and SSI in this motion. The motion as it relates to DP
Plaintiffs' claims against SEA was granted by stipulation, and SEA
is no longer a Defendant in this lawsuit. Docket No. 1131.

1 they are based on purchases of PSRAM. That portion of Samsung's
2 motion will be addressed in a separate order.

3 Some of the issues raised in this motion are also presented
4 by Samsung and Cypress Semiconductor Corporation's joint motions
5 to exclude Plaintiffs' expert evidence and to decertify the DP and
6 IP classes. The Court's order denying those motions address some
7 of the issues in the present motion.

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9 The Court heard oral argument on this motion on October 14,
10 2010. Having reviewed all of the parties' submissions and
11 considered their oral arguments, the Court denies the part of
12 Samsung's motion for summary judgment on Westell's individual
13 claims.

14 BACKGROUND

15 In this antitrust multi-district litigation, Direct and
16 Indirect Purchasers allege that Defendant manufacturers engaged in
17 a price-fixing conspiracy related to a product called Static
18 Random Access Memory (SRAM). The facts of this case have been
19 described in greater detail in the Court's prior orders.

20 LEGAL STANDARD

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22 Summary judgment is properly granted when no genuine and
23 disputed issues of material fact remain, and when, viewing the
24 evidence most favorably to the non-moving party, the movant is
25 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
26 56. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
27 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1289 (9th Cir.
28

1 1987). The court must draw all reasonable inferences in favor of
2 the party against whom summary judgment is sought. Matsushita
3 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986);
4 Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558
5 (9th Cir. 1991).

6 Material facts which would preclude entry of summary judgment
7 are those which, under applicable substantive law, may affect the
8 outcome of the case. The substantive law will identify which
9 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.
10 242, 248 (1986).

11 In this action, DP Plaintiffs must prove that Defendants
12 conspired to fix prices in violation of the antitrust laws, prices
13 were fixed pursuant to that conspiracy, and DP Plaintiffs
14 purchased SRAM at prices that were higher than they would have
15 been absent the conspiracy. In re Citric Acid Antitrust Litig.,
16 1996 WL 655791 at *6 (N.D. Cal.).

17 DISCUSSION

18 Samsung argues that summary judgment should be granted in its
19 favor on Westell's individual claims, due to evidence that Westell
20 purchased SRAM only outside of the damages subperiod. Records
21 indicate that Westell made hundreds of purchases of SRAM beginning
22 in 1999, but began purchasing SRAM directly from Defendant
23 Integrated Silicon Solution, Inc. (ISSI) only beginning in June,
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2003.² Declaration of Gary Winters (Winters Dec.), Ex. 6.

Samsung asserts that this evidence demonstrates that Westell suffered no injury, cannot prove damages, and thus lacks standing. The Court disagrees.

One of DP Plaintiffs' experts, Dr. Roger G. Noll, analyzed extensive evidence of Defendants' conduct to determine whether their communications would be regarded as collusive by antitrust economists, and evaluated conditions in the SRAM manufacturing industry to assess whether the alleged behavior was likely to cause injury in the form of overcharges. Dr. Noll concluded that "the exchange of crucial confidential business information among defendants that is revealed in discovery documents is likely to have caused harm to buyers of SRAM by elevating prices."

Declaration of Roger G. Noll (Noll Dec., lodged under seal 8/24/10), Ex. A at 4-5. DP Plaintiffs' second expert, Dr. Armando Levy, calculated damages due to overcharges for SRAM. Dr. Levy determined that the conspiracy was most effective in the twenty-seven months from October, 1999 to December, 2001. He calculated damages amounts solely for that subperiod, finding \$458 million to \$603 million in damages. Declaration of Armando Levy, Ex. B (Levy Reply Report at ¶ 4).

Samsung cites McGlinchy v. Shell Chemical Co., 845 F.2d 802, 808-809 (9th Cir. 1988), for the proposition that plaintiffs in

² ISSI has since reached a settlement agreement with DP Plaintiffs. Docket No. 1026.

1 all antitrust cases must prove an amount of damages to establish
2 injury and survive summary judgment. The plaintiffs in McGlinchy
3 brought an antitrust action against Shell Chemical and other
4 Shell-related entities after Shell Oil and Shell International
5 Chemical Company terminated their contracts with the plaintiffs.
6 Id. at 804-805.

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8 During the litigation the plaintiffs faltered in producing
9 evidence that they suffered injury, i.e. "lost profits," as a
10 result of the conduct that allegedly violated antitrust law. They
11 presented two expert witnesses, both of whom used unreliable
12 methods to calculate the economic injury, and were unable to draw
13 a causal connection between the defendant's alleged unlawful
14 conduct and the lost profits. The court excluded both expert
15 witnesses. Consequently, the court ruled that the plaintiffs
16 lacked proof of injury and proof of damages, and thus lacked
17 standing. On this basis, the court granted summary judgment in
18 the defendants' favor. Id. at 808-809.

19
20 Here, DP Plaintiffs do have proof that Westell was injured.
21 Dr. Noll opined that Defendants' collusive conduct and conditions
22 in the SRAM market created a high probability that DP Plaintiffs
23 suffered injury through overcharges. Through his empirical
24 analysis, Dr. Levy found overcharges and an amount of damages
25 during a part of the class period. Thus, the injury was not
26 speculative, even though the amount of Westell's damages may not
27 be quantified.
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1 In Zenith Radio Corp. v. Hazeltine Research, Inc., the
2 Supreme Court explained, "[Plaintiff's] burden of proving the fact
3 of damage . . . is satisfied by its proof of some damage flowing
4 from the unlawful conspiracy; inquiry beyond this minimum point
5 goes only to the amount and not the fact of damage." 395 U.S.
6 100, 114 n.9 (1969). See also In re Catfish Antitrust Litigation,
7 908 F. Supp. 400, 410 (N.D. Miss. ("An adequate showing of the
8 amount of damages is not necessarily required for the plaintiffs
9 to survive the defendants' motions for summary judgment [in an
10 antitrust action].")

11
12 The present case is readily distinguishable from Gerlinger v.
13 Amazon.com, Inc., Borders Group, Inc., where the plaintiff
14 provided no evidence that he paid inflated prices for books. 526
15 F.3d 1253, 1254-55 (9th Cir. 2008). The general academic articles
16 that the plaintiff submitted to the court did not suffice to
17 establish injury. Id. Rather, the defendants presented evidence
18 that the plaintiff paid equal or lower prices for his books as a
19 result of the defendants' marketing agreement. Id. at 1255. The
20 court granted summary judgment based on the plaintiff's failure to
21 produce any evidence of injury, and resulting lack of standing.
22 Here, however, DP Plaintiffs provide qualitative and empirical
23 analysis of the SRAM market in which Westell was a direct
24 purchaser. That Westell lacks a precise amount of damages does
25 not negate the injury nor Westell's standing.
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28 Nor does City of Vernon v. Southern California Edison

1 Company, 955 F.2d 1361 (9th Cir. 1992), persuade the Court that
2 summary judgment is warranted here. In that case, the plaintiff
3 city instituted an action against an electric utility alleging
4 numerous antitrust violations. The court found that the "study
5 failed to segregate the losses, if any, caused by acts which were
6 not antitrust violations from those that were." Id. at 1372. The
7 expert evidence in this case does not provide a similar basis for
8 granting summary judgment.
9

10 Samsung cites other cases to support its contention that
11 Westell must prove an amount of damages to establish injury, but
12 these cases are irrelevant to the issue. In Sloan v. Urban Title
13 Services., Inc., the defendant had moved for summary judgment on
14 the issue of damages based on the plaintiff's claims for breach of
15 contract, breach of fiduciary duty, and negligence; no antitrust
16 claim was implicated in that part of the court's decision. 689 F.
17 Supp. 2d 123, 133-35 (D.D.C. 2010). In In re Broadcom
18 Corporations Securities Litigation, the shareholder plaintiffs
19 sued the defendants, alleging that they artificially inflated the
20 companies' earnings. 2004 U.S. Dist. LEXIS 28088, at *1-10 (C.D.
21 Cal.). The court granted partial summary judgment for the
22 defendants to exclude from consideration certain press releases.
23 The court did not grant summary judgment for the defendants on a
24 claim due to the plaintiff's failure to prove an amount of
25 damages.
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28 In In re Plastic Additives Antitrust Litigation, the court

1 found that the expert evidence, lacking in any empirical analysis,
2 was too general to demonstrate class-wide impact due to price
3 increase. 2010 U.S. Dist. LEXIS at *17-55 (E.D. Pa.). The court
4 rejected the expert evidence, because it relied on price listings,
5 rather than transactional data. Dr. Levy's report, in contrast,
6 uses transactional data. Nor does Robinson v. Texas Auto Dealers
7 Association, 387 F.3d 416, 422 (5th Cir. 2004), establish a rule
8 that an amount of damages must be presented in order for a
9 plaintiff to survive summary judgment. Rather, the case explains
10 that generalized proof of purchases at an inflated price is
11 acceptable for purposes of showing the predominance of common
12 issues at class certification. Id. at 422-23. Cal. CNG, Inc. v.
13 S. Cal. Gas. Co., 19 Fed. Appx. 500, 502 (9th Cir. 2001), is
14 similarly unhelpful to Samsung's argument, and furthermore, it is
15 an unpublished decision from before January 1, 2007, which may not
16 be cited pursuant to Ninth Circuit Rule 36-3.
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19 With Dr. Noll and Dr. Levy's expert reports, DP Plaintiffs
20 have evidence of injury and damages due to purchases of overpriced
21 SRAM which supports Westell's standing.

22 Samsung's reliance on McGlinchy is unavailing for another
23 reason. DP Plaintiffs allege a horizontal price-fixing
24 conspiracy, a per se antitrust violation. No per se violation was
25 alleged in McGlinchy. 845 F.2d at 808-809, 811 n.3. Courts have
26 presumed class-wide injury and impact in horizontal price-fixing
27 cases in the context of class certification motions. In re Citric
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1 Acid, 1996 WL 655791 at *7 (recognizing that some courts presume
2 class-wide impact "upon all purchasers of a price-fixed product in
3 a conspiratorially affected market."); accord In re Rubber Chems.
4 Antitrust Litig., 232 F.R.D. 346, 352 (N.D. Cal. 2005). Samsung
5 cites no authority that proscribes use of the presumption of
6 class-wide injury at the summary judgment stage.

7
8 It is true that Westell may be unable to quantify any damages
9 it incurred. Even if that is the case, however, it would not
10 deprive the company of standing, because it may seek nominal
11 damages. See Dry Cleaning & Laundry Institute of Detroit, Inc. v.
12 Flom's Corp., 841 F. Supp. 212, 215 (E.D. Mich. 1993). In that
13 price-fixing case, the court rejected the defendants' argument
14 that they were entitled to summary judgment on the issue of injury
15 due to the plaintiffs' uncertain proof of damages. The court
16 said, "[E]ven if plaintiff has insufficient proof of amount of
17 damages, the proof of violation and fact of damage is a sufficient
18 basis for an award of nominal damages." Id. The court cited
19 Sciambra v. Graham News, 892 F.2d 411, 415 (5th Cir. 1990), and
20 U.S. Football League v. National Football League, 842 F.2d 1335,
21 1376-70 (2d Cir. 1988). In Sciambra, equating "the fact of
22 damage" with proof of injury, the court explained,
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25 The fact of damage does not require the antitrust
26 plaintiff to prove with particularity the full scope
27 of profits that might have been earned in the absence
28 of unlawful activity in restraint of trade. It
requires only that a plaintiff show with some
particularity an element of actual damage caused by
the defendant's violation of the antitrust laws . . .

1 Even if there is insufficient proof of the amount of
2 damages, however, proof of an antitrust violation and
3 the fact of damage is a sufficient basis for an award
4 of nominal damages.

892 F.2d at 415.

5 Finally, DP Plaintiffs argue that Westell has an additional
6 basis for standing because, in addition to damages, it seeks to
7 enjoin Defendants from engaging in continued price collusion.³

8 The alleged conspiracy by SRAM manufacturers to elevate
9 prices was pervasive, continuing from November 1, 1996 to at least
10 December 31, 2005. Evidence indicates that Samsung employees at
11 the highest levels operated as ringleaders, orchestrating meetings
12 and communicating globally with fellow conspirators to exchange
13 critical price and business information. Nowhere in its motion
14 for summary judgment does Samsung dispute that the conspiracy
15 occurred. The potential scope of impact is far-reaching given
16 that SRAM is a key component in much of the computer and
17 communications technology that is the basis for modern society's
18 functioning.
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21 "[T]he possibility of future injury may be sufficient to
22 confer standing on plaintiffs; threatened injury constitutes
23 'injury in fact.'" Central Delta Water Agency v. United States,
24 306 F.3d 938, 947 (9th Cir. 2002) (citing Ecological Rights
25 Foundation v. Pacific Lumber Co., 230 F.3d 1141, 1151 (9th Cir.

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27 ³ In asserting this basis for standing, DP Plaintiffs adopted IP
28 Plaintiffs' arguments in IP Plaintiffs' Opposition to Samsung's
Motion for Summary Judgment in Indirect Purchaser Actions.

1 2000)). "The Supreme Court has consistently recognized that
2 threatened rather than actual injury can satisfy Article III
3 standing requirements." Id. (quotations and citations omitted).

4 The SRAM market remains concentrated, and has continued to
5 consolidate, while barriers to entry for new competitor
6 manufacturers remain high. Declaration of Christopher Micheletti
7 (Micheletti Dec.), Ex. 1 (Harris Report at ¶¶ 62-65, Ex. 4).
8 Evidence suggests that Defendants continue to maintain their
9 relationships. Micheletti Dec., Ex. 16. These factors can
10 contribute to collusion. Harris Report at ¶¶ 62-65. In addition,
11 DP Plaintiffs have produced significant evidence of Defendants'
12 collusive conduct and overcharges. "[W]here the defendants have
13 repeatedly engaged in the injurious acts in the past, there is a
14 sufficient possibility that they will engage in them in the near
15 future to satisfy the 'realistic repetition' requirement."
16 Armstrong v. Davis, 275 F.3d 849, 861 (9th Cir. 2001).
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18
19 Westell has purchased SRAM extensively in the past, continues
20 to purchase the product for testing and development for possible
21 use in the company's products, and may buy it from one of the
22 manufacturers named in the present lawsuit. Declaration of Mark
23 Skowronski (Skowronski Dec.) at ¶¶ 2-4. Westell made well over
24 two hundred purchases of SRAM from 1999 to 2004. Winters Dec.,
25 Ex. 6. From at least June, 2003 to September, 2007, Westell
26 purchased SRAM from ISSI. Id.; Skowronski Dec. at ¶¶ 2-3, Ex. C.
27 From June, 2003 through 2004, Westell made over thirty-five
28

1 purchases of SRAM from ISSI, with two purchases valued at over
2 \$100,000, and seven purchases costing over \$40,000. Winters Dec.,
3 Ex. 6.

4 Westell is at a greater risk of future injury than the
5 plaintiffs in O'Shea v. Littleton, 414 U.S. 488 (1974), Nelsen v.
6 King County, 895 F.2d 1248 (9th Cir. 1990), and Lujan v. Defenders
7 of Wildlife, 504 U.S. 555 (1992), cases on which Samsung relies.
8 In O'Shea, the Court observed, "Neither the complaint nor
9 respondents' counsel suggested that any of the named plaintiffs at
10 the time the complaint was filed were themselves serving an
11 allegedly illegal sentence or were on trial or awaiting trial
12 before petitioners." 414 U.S. at 496. In Nelson the plaintiffs
13 were no longer in the treatment center where their rights were
14 allegedly violated. 895 F.2d at 1249. The threatened harm to the
15 plaintiffs in Lujan was attenuated, based on past trips to foreign
16 countries to observe endangered species, without present plans to
17 return. 504 U.S. at 558-59.

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20 DP Plaintiffs have shown a threat of future injury. Along
21 with their expert testimony of injury, the presumption of class-
22 wide impact from price-fixing activities, and the availability of
23 nominal damages, this is sufficient to provide Westell with
24 standing to pursue its case on the merits. Accordingly, the Court
25 denies Samsung's motion for summary judgment on the individual
26 claims brought by Westell.

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28 II. Summary Judgment in Event Dr. Levy's Testimony is Excluded

1 Samsung argues that it is entitled to summary judgment if Dr.
2 Levy's expert opinions are excluded. The Court denied the motion
3 to exclude Dr. Levy's opinions in a separate order. Therefore,
4 this argument by Samsung is moot, and the Court does not rule on
5 it.

6 CONCLUSION

7 The Court denies Samsung's motion for summary judgment on Westell's
8 individual claims.

9 The part of Samsung's motion addressing PSRAM will be decided
10 in a separate order. Docket No. 1039. The Court granted
11 Samsung's motion for summary judgment as to claims against SEA in
12 an earlier order by stipulation. Docket No. 1131.

13 IT IS SO ORDERED.

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15 Dated: 12/13/2010

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17 CLAUDIA WILKEN
18 United States District Judge
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